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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

NO. 144

OCTOBER TERM, 1954

EDGAR Q. COLLINS, Petitioner

v.

LOUISE COLLINS, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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Jurisdiction.

The judgment of the Supreme Court of the Commonwealth of Pennsylvania was entered on April 14, 1954. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Sec. 1257.

Question Presented.

1. Is the Decree in Absolute Divorce granted to petitioner by the Florida Court entitled to "full faith and credit" in Pennsylvania, under the provisions of the Federal Constitution?

2. Did respondent so participate in the Florida proceedings in divorce as to preclude the Pennsylvania Court from inquiring into the Florida Court's finding that it had jurisdiction to sever the marital tie between the petitioner and respondent, *i. e.* is the finding of jurisdiction by the Florida Court *res judicata?*

Statute Involved.

There is no State Statute involved in this question.

Statement.

That petitioner and respondent were married November 14, 1925, in Wheeling, West Virginia, and thereafter lived together in Allegheny County, Pennsylvania, until June 30, 1946.

In the month of July, 1950, the respondent filed an action in divorce from bed and board against the petitioner in the Court of Common Pleas of Allegheny County, Pennsylvania, and obtained a Decree in Divorce

a mensa et thoro on February 15, 1951, under the terms of which limited divorce the petitioner was required to pay the respondent as alimony the sum of $400.00 per month thereafter.

On November 25, 1951, the petitioner moved to Pinellas County, Florida, and thereafter, on March 1, 1952, he filed a Complaint in Divorce in the Circuit Court of the Sixth Judicial Circuit, State of Florida. The respondent received a copy of the Complaint by registered mail, together with a Notice of Suit requiring her to make a written defense to the same on or before April 3, 1952.

Following the receipt of said Notice of Suit, the respondent, in her own handwriting, prepared a lengthy exposition of her defense to the charges set forth in the Petitioner's Complaint, setting forth *inter alia,* the petitioner's lack of bona fide intent to make Florida his residence, and alleging counter-charges to the Appellant's Complaint. See Record 12a for respondent's statement entered in the Florida Court as Exhibit A.

The statement so prepared by respondent was addressed to "President Judge, Sixth Judicial Circuit Court, Pinellas County, Clearwater, Florida." The President Judge of said Court, upon receipt of said statement, filed the same as a pleading in the Florida Divorce case on April 2, 1952. The respondent had written the said statement and forwarded it to the President Judge of the Sixth Judicial Circuit Court of the State of Florida immediately following the receipt by her of a copy of Petitioner's Complaint in Divorce and Notice of Suit, which notice directed her to file the origi-

nal of her "written defense" to the Bill of Complaint on or before April 3, 1952.

Following the filing of the above mentioned statement of the respondent by the President Judge of the Florida Court, petitioner moved to strike said statement because it allegedly failed to conform to the Florida equity rules regarding an Answer (R. 47a). Pursuant to the Rule granted on said Motion, the respondent was notified by the Florida Court that the motion to strike her Answer would be called for a hearing on May 15, 1952, (R. 49a). The said Notice of Hearing was received on May 8, 1952 (R. 50a).

The respondent failed to contest the Motion to Strike the Answer written by her and failed to present herself at the time fixed for hearing of the Divorce Complaint against her and a Decree in Absolute Divorce was entered on May 22, 1952, divorcing petitioner from respondent (R. 70a).

Subsequent to the entering of the Florida Divorce Decree, petitioner herein presented his Petition to the Court of Common Pleas of Allegheny County, Pennsylvania, requesting a Rule to Show Cause why the Decree requiring him to pay alimony should not be vacated, since alimony, except in limited circumstances not applicable to this case, is not allowed in Pennsylvania subsequent to a Decree in Absolute Divorce.

An Answer to the Petition was filed by the respondent, testimony was taken, and the Court of Common Pleas on April 2, 1953, entered an Order discharging the Rule and holding the petitioner in contempt for failure to continue the support payments.

Thereafter, petitioner filed his Appeal in the Superior Court of Pennsylvania, basing his entire position on the premise that the respondent had so participated in the Florida divorce proceedings, as to make herself a party to such proceedings, and that, therefore, the Pennsylvania Court was precluded from making any inquiry into the finding of the Florida Court that it had jurisdiction in the matter.

That thereafter, on March 16, 1954, the Superior Court of the Commonwealth of Pennsylvania affirmed the Order entered by the Court of Common Pleas of Allegheny County, Pennsylvania, thereby refusing to give full faith and credit to the Decree in Absolute Divorce granted by the Florida Court and in violation of Article IV, Section 1, of the Constitution of the United States.

On March 25, 1954, respondent filed a Petition in the Supreme Court of the Commonwealth of Pennsylvania requesting the allowance of an appeal from the Superior Court to the Pennsylvania Supreme Court. The Petition for allowance of appeal was denied by the Pennsylvania Supreme Court under Order dated April 14, 1954.

Specification of Errors to Be Urged.

The Supreme Court of Pennsylvania erred:

1. In holding that the Florida Court did not have jurisdiction over the respondent in the divorce action brought in that State.

2. In holding that the writing prepared by the respondent and forwarded by her in accordance with the Florida Court's Order before the last date for answer, did not constitute an answer or an appearance by her in the Florida proceedings.

3. In holding that Article IV, Section 1 of the U. S. Constitution did not apply.

4. In affirming the Order of the Superior Court of Pennsylvania.

Reasons for Granting the Writ.

By the plain provisions of Article IV, Section 1 of the Constitution of the United States, each State is required to recognize a Divorce Decree granted in a sister State as prima facie valid.

An exception to the above general rule was formulated in the second *Williams v. North Carolina Case,* 325 U.S. 226; *Esenwein v. Esenwein,* 325 U.S. 279; and *Rice v. Rice,* 336 U.S. 674, which cases evolved the now common and basic doctrine that a "domicile (by plaintiff) in good faith in the state granting the divorce decree is an essential jurisdictional fact, and if that ingredient is lacking the decree need not be enforced outside the state where it was secured."

It is now settled that the Constitutional Mandate in favor of full faith and credit does not preclude a sister state from a collateral and independent scrutiny of the action of the forum rendering the decree for the purpose and only for the purpose of determining whether that forum had jurisdiction of the person seeking the divorce.

It follows, therefore, that if in the instant case, petitioner had merely gone to Florida, remained the minimum time required to obtain a divorce, obtained service of the divorce process upon his wife solely by publication or mail, and procured a divorce based thereon, the Pennsylvania Court would not be compelled to accept the Florida Decree, and could find that petitioner had not established a bona fide residence in Florida, and, could thus deny that the Florida Court had jurisdiction. But, there is in this case an additional factor not present in any of the cases thus far cited.

There is here involved a letter addressed to the President Judge of the Florida Court, requesting that Judge to refuse plaintiff's divorce, setting forth reasons why such divorce should be refused, attacking petitioner's domicile in Florida, questioning the plaintiff's right to a divorce and his intention of acquiring a permanent home in Florida, and requesting a reply. This writing was filed of record by the Court as a pleading in the Florida proceedings.

Referring again to the U. S. Supreme Court, an early case is that of *Andrews v. Andrews,* 188 U. S. 14, in 1903:

There it was held that where both husband and wife appeared in the decree granting state, nonetheless the wife could still collaterally attack the decree in a sister state on the ground the purported domicile has been acquired solely for the purpose of getting the divorce.

This case was specifically overruled on June 7, 1948, by the decision in *Sherrer v. Sherrer,* 334 U. S. 343 and by *Coe v. Coe,* 334 U. S. 378, where it was held that if the defendant appears, has an opportunity to attack the plaintiff's domicile and raise the question of jurisdiction, but fails to do so, the divorce decree is final in the state of rendition, and is not open to collateral attack.

To the previous postulate that the constitutional mandate does not preclude a sister state's scrutiny of the decree rendering state's jurisdiction over the person of the party seeking the divorce, must be added this corollary; the sister state cannot question the rendering state's decree where the defendant has appeared, and has an opportunity to question the jurisdiction of

the rendering state, and has an opportunity to attack the plaintiff's domicile.

In this regard, the factual situation in Sherrer v. Sherrer, *supra,* merits scrutiny. There, Edward C. Sherrer and Mary E. Sherrer were married in New Jersey in 1930. Between 1932 and 1944, both lived together in Monterey, Massachusetts, where two children were born to the union.

On April 3, 1944, Mrs. Sherrer went to Florida. There she was soon joined by a male companion.

On July 6, 1944, she filed a divorce action in the Circuit Court of Sixth Judicial Circuit of the State of Florida. Mr. Sherrer was notified by registered mail.

He retained Florida counsel who entered a general appearance, and filed an answer denying the wife's allegations including that of her Florida residence.

November 14, 1944, hearings were held at which Mr. Sherrer personally appeared to testify as to a stipulation entered into between the parties relating to the custody of the children.

Mr. Sherrer did not seek to cross-examine his wife, or to rebut her testimony.

November 29, 1944, the Florida Court entered a decree of divorce after finding that Mrs. Sherrer was a bona fide resident of the state, and that it had jurisdiction of the parties and the subject matter.

Two days later, Mrs. Sherrer married her male companion.

February 5, 1945, Mrs. Sherrer and her newly acquired husband returned to Massachusetts to live.

In June, 1945, Mr. Sherrer filed an action in the Probate Court in Massachusetts, seeking to dispose of his real estate and alleging the Florida divorce of Mrs. Sherrer was invalid, and her marriage void.

The Probate Court heard testimony, and granted Mr. Sherrer the requested relief, holding Mrs. Sherrer was never domiciled in Florida.

The Massachusetts Supreme Court affirmed the ruling on the grounds that it was supported by the evidence and that the requirements of full faith and credit did not preclude the Massachusetts Court from re-examining the finding of domicile made by the Florida Court.

Upon appeal, the U. S. Supreme Court reversed the lower Court, and denied the right of Massachusetts to question the jurisdictional issue resolved by the Florida Court.

In a dissent, Mr. Justice Frankfurter, joined by Mr. Justice Murphy, pointed out that the Florida Court had, by a feigned and sham arrangement between the parties, succeeded in terminating a marital status in which Massachusetts had an interest, and that the divorce had been procured in controvention of its (Massachusetts) laws. At pages 376-377 of the U.S. Report, he summarizes the majority holding:

> "My disagreement with the decision of the court is not as to the weight of the evidence, but concerns what I take to be its holding, that the opportunity of the parties to litigate the question of jurisdiction in Nevada (Coe v. Coe) and Florida

(the Sherrer case) foreclosed Massachusetts from raising the question later. * * * But the crux of today's decision is that regardless of how overwhelming the evidence may have been that the asserted domicile in the state offering bargain counter divorces was a sham, the home state of the parties is not permitted to question the matter if the form of a controversy has been gone through."

The test, therefore, in determining whether the party initiating the divorce action has established a bona fide residence in the decree granting state, is: Has the contending party been given the opportunity to litigate the question of jurisdiction? See Sherrer v. Sherrer, at page 352, where Mr. Chief Justice Vinson, speaking for the majority, says:

> "We do not believe that the dereliction of a defendant under such circumstances should be permitted to provide a basis for subsequent attack in the courts of a sister state of a decree valid in the state in which it was rendered."
>
> "After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction then rendered merely retries the issue previously determined."

It remains, therefore, to examine the instant case for the purpose of determining whether Mrs. Collins had the opportunity to present her evidence, whether she had her day in Court.

The test previously stated, *i. e.*, opportunity to litigate, is adequately met in the instant case. Here Mrs.

Collins was apprised of the institution of a divorce action against her. She received a copy of the complaint by registered mail. She forthwith prepared and forwarded a complete answer to all her husband's allegations, including in the instrument a number of cross-charges, and finally, concluding with a denial that the suit was brought in good faith.

The answer was sent to the President Judge of the Florida Court. He treated it as an answer and had it filed with the record of the Proceedings.

Petitioner's counsel moved to strike the letter as a defective answer. Appellee was notified that a hearing would be had on this motion, and to appear if she desired to question it.

Respondent did not appear in answer to this notice, nor did she otherwise participate in the proceeding thereafter.

The entire issue, therefore, is dependent upon the effect of Respondent's letter of March 25, 1952, registered No. 471, and filed in the Florida Court on April 2, 1952.

Shall we determine the question by reference to the substantive law of Florida?

Or is the conclusion predicated upon the substantive law of Pennsylvania?

In either case, the result is similar.

Reference to the official record of the Florida divorce, defendant's Exhibit "3", shows that the Court there treated the letter as an answer, and that it was attacked by appellant's counsel for the reason that it

did not comply with the technical rules governing the filing of an answer. The record shows further that the letter was stricken from the record on May 15, 1952, after notice to Respondent (Exhibit "2") and after Respondent had been given an opportunity to comply with the Florida rules of Court applicable to the filing of an answer.

Petitioner contends that by the law of Florida, Respondent's letter was an answer, that the Court treated it as such, albeit defective, and that its delivery to the Florida Court made appellee a party to the action within the meaning of the Sherrer and Coe cases, *supra.*

In this regard, see Harold Kooman "Florida Chancery Pleading and Practice Annotated", a standard and accepted authority in Florida, wherein it is stated, Page 39, "It has always been the rule in Courts of equity that mispleading in matters of form was never allowed to prejudice any party." And again, "Exceptions to formal minutae in the pleadings were never allowed by the Court to prevent a hearing on the merits."

See *Samos v. Wightman,* 31 Fla. 45, 12 So. 536, and *Hoppkins v. Anderson,* 113 Fla. 39, 152 So. 205, for applications of the quoted principles.

Again the 1931 Chancery Act provided "all technical forms of bills and answers and other pleadings in equity are hereby abolished."

In interpreting this proviso the Courts of Florida have taken the position that if the substantial rights of the parties may be ascertained and determined from the pleadings, it is the duty of the Court to consider and decide them without regard to the form of the

pleadings. See *Wilcox v. L. Panco Poppular,* 225 Fed. 442. Therefore, where the strict enforcement of the letter of the rules of practice would tend to prevent or jeopardize the ends of justice and equity, the technical rules must yield to the higher purpose. To effectuate this end, the Courts have a wide discretion in the matter of construing pleadings. *O'Gara v. Hancock,* 76 Fla. 1, 179 So. 167 and *Demos v. Walker,* 99 Fla. 302, 126 So. 305.

We are convinced that the chancellor in construing the letter, or document, filed with him by Mrs. Collins, was acting in accordance with the principles of equity and that he committed no error in construing the letter as an answer to the bill of complaint filed by Mr. Collins. Rule 6 provides that filing may be with the clerk or with the court. In the present instance, the letter of defenses of Mrs. Collins was addressed to the Court and filed by him. The Supreme Court of Florida in the case of *Drawdy Investment Co. v. McIntosh Investment Co.,* reported in 108 Fla. 531, 146 So. 553 indicated that even a telegram to the clerk requesting that a defendant's appearance be entered in a cause, might be sufficient to constitute an appearance. In that case the court refused to set aside a decree *pro confesso* against the defendant, but on the grounds that the defendant, though appearing, had not filed a timely answer. Certainly, if a telegram is sufficient to constitute an appearance, a document such as filed by Mrs. Collins in which her defenses are set forth, by all means should be construed as an appearance. It is the common and accepted practice through the various circuits in the State of Florida to construe documents such as filed by Mrs. Collins as answers, where such documents contain denials of the

allegations of the bill of complaint and constitute the defendant's entire defense.

Where a defendant takes some step in the proceedings which amounts in law to a submission to the jurisdiction of the Court, the fact that the defendant did not intend to submit to the jurisdiction of the court does not preclude the court from holding that the defendant entered a general appearance in the cause. This principle was enunciated in the case of *Sternberg v. Sternberg,* 139 Fla. 219, 190 So. 486.

The question of whether the plaintiff in a divorce action has been a resident of Florida so as to enable him to maintain a suit should properly be raised in the answer. *Rollins v. Rollins,* 155 Fla. 83, 19 So. 2d 562.

Any pleading to the merits, whenever made, constitutes a general appearance in an equity action and such appearance settles all questions of defect in service. *Ortell v. Ortell,* 107 So. 443 and *Gulfview Apartments v. City of Venice,* 145 So. 842.

It follows, therefore, that under the law of Florida, Respondent filed her answer to Petitioner's Complaint, and duly made her appearance; that she had the opportunity to and did, attack Petitioner's domicile, and did raise the question of the forum's jurisdiction. Under authority of the Sherrer and Coe cases, *Supra,* she is debarred from collateral attack upon her former spouse's decree, and the matters therein are *res judicata.*

Any claim of fraud upon the Court, any charge of perjury, or any other attack upon the decree of Mr. Collins should have been presented to the Florida Court. All questions put to Mr. Collins in the hearing below

which were intended to attack the Florida decree collaterally, were, for these reasons, clearly incompetent, irrelevant and immaterial, and appellant's objections thereto should have been sustained.

If, instead of the Florida law, the principles of Pennsylvania law relative to the effect of Respondent's letter are invoked, the decisions are in accord.

See *Anderson Pa. Civil Practice,* Vol. 2, page 287.

> "The filing of an appearance under Rule 1012 is not the exclusive manner of appearing in an action. As under the prior practice, the taking of any step in the action * * * has the effect of an appearance and constitutes a waiver of all defenses and objections which could have been waived by a general appearance."

Any action by the defendant, in person or by attorney, looking to a determination of the cause on its merits operates as an appearance, prevents a default, and subjects the defendant to the jurisdiction of the Court.

Jeannette Borough v. Roehme, 197 Pa. 230;
Wormley's Estate, 359 Pa. 295;
Wright v. Millikin, 152 Pa. 507;
Morton v. Hoodles, 1 Miles 46.

> "It is a familiar principle that the defendant, if he would be heard on the merits, must be in Court by a formal appearance, or by some act implying his submission to its judgment on the merits."
>
> *Skidmore v. Bradford,* 5 Pa. 296.

"A presentation of matter of defense to the action is such an act, even if accompanied with a denial of the right of the Court to hear the cause."

Jeannette Borough v. Roehme, 197 Pa. at 232;
Lycoming Fire Ins. Co. v. Storrs, 97 Pa. 354;
Byers v. Byers, 208 Pa. 23;
Thomas v. Thomas, 112 Super. 578.

It follows, therefore, that by Pennsylvania law, Mrs. Collins made an appearance, filed an Answer on the merits in which she set forth a full defense, and thereby subjected herself to the jurisdiction of the Florida Court.

By so doing, she came within the full sweep of the full faith and credit clause of the U. S. Constitution, and cannot now collaterally attack the decree of the Florida Court. In the words of the decision in Sherrer v. Sherrer, *supra*:

"The requirements of full faith and credit bar the defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State, where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree."

See also:

Estin v. Estin, 334 U. S. 541;
Kreiger v. Kreiger, 334 U. S. 555; and
Rice v. Rice, 336 U. S. 674.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Date—May 28, 1954